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No. 224

Supreme Court of the United States

OCTOBER TERM, 1946.

J. K. DUNSCOMBE, PETITIONER,

VS.

SCOTT W. LOFTIN & JOHN W. MARTIN, AS TRUSTEES FOR FLORIDA EAST COAST RAILWAY CO., DEBTOR, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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INDEX TO PETITION FOR CERTIORARI

INDEX TO BRIEF

Florida Constitution

FEDERAL STATUTES

FEDERAL RULE

FLORIDA STATUTES

CASE BOOK

TABLE OF FEDERAL CASES

TABLE OF STATE DECISIONS

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To the Honorable the Supreme Court of the United States:

J. K. Dunscombe, the petitioner in the bankruptcy court, respectfully petitioning, shows the court as follows:

STATEMENT OF MATTERS INVOLVED.

The petitioner seeks a review of a decision of the United States District Court for the Southern District of Florida refusing to relax its 15 year stay of suits against the bankrupt railroad and determining the merits of the controversy at a summary hearing, without affording due

process of law and assuming jurisdiction to determine questions of fact that the federal court had no authority to hear. This decision was appealed to the Circuit Court of Appeals for the 5th Circuit and affirmed and which decision appears under the reports as J. K. Dunscombe, appellee, v. Scott Loftin *et als.*, ____ F. 2d ____.

Petitions for rehearing were sought and denied in both lower courts.

The basis for the claim of right to sue the receivers arose from the following circumstances: The Florida East Coast Railway Company, which will hereinafter be called the Railway had been in bankruptcy for some fifteen years and the district judge had entered a stay order against suits unless permission first obtained. About five years before the Railway had been adjudicated a bankrupt and the stay order granted, it had taken a strip of land about a mile and a half long on the east edge of Commissioner's Lot 3 of the Hanson Grant. It used this land for building a double track railroad upon, dug holes for barrow pits and threw up a grade and evidenced claims of ownership in such manner in 1926 and at which time the petitioner claimed she was the owner of this land, but that the railway had no deed or title to this land of any nature. Under the Florida law a railway corporation with the right of eminent domain can take what property it needs in order to perform its functions, for which it was chartered, without first purchasing or condemning such land and after it is in possession take steps to acquire such property or if it fails to take any action the owner can claim a vendor's lien for the value of the property so taken and go in the State Circuit court in the County in which the land is located and seek to enforce the vendor's lien and under the Florida law a 20 year statute of limitations is applicable to vendor's lien actions.

In this case the petitioner asserts her land was taken for such public use in 1926 and absent any stay order that tolled the statute of limitations, her right to enforce her lien had not expired when she petitioned the District Court to relax its stay order and permit her to enforce her vendor's lien in the State Circuit Court for Martin County, Florida.

She traced her title or claim to this property as follows: The land was in a Spanish Grant and there were in 1891 a large number of joint tenants in common claiming the same. One Annabelle Robertson at that time brought a suit to have that grant partitioned in the same federal court, made her other joint tenants defendants and also included the Railway, which she claimed was asserting a claim but had no interest. She prayed that the claims and amounts thereof be determined and the grant partitioned accordingly. The Court upon investigation found the Railway held a deed from a joint tenant to an entire interest and found it void, determined who the lawful claimants were and what their respective interests were, found the Railway had no claim of any nature, appointed three partition commissioners and instructed them to partition the grant among those found to have lawful claims and according to their respective interests.

The commissioners proceeded to partition the grant, they found a single track railway running across the grant, awarded the Railway nothing, but used this track as a dividing line between lots 2 and 3. Lot two being on the east side of this line and Lot 3 on the west. The court confirmed this plan of division and the allotments to the various claimants and in the conclusion of the final decree stated "that the Railway was entitled to land it then had its single track upon and used for the operation of the railroad."

The petitioner does not question the right of the Judge to in this manner give the property of the joint tenants to the Railway as long as this gift or grant does not claim to extend beyond the land it then had its single track railroad on. She was not the owner of any land in the Hanson Grant at that time and has no claim for any land so taken at that time.

In 1913 Sewall's Point Land Company, that held the title to Lots 2 and 3 of the commissioner's partition, platted these lots and showed thereon a reservation of 100 feet in width, the center of which was the middle of the single track railroad. There was no dedication on this plat to any land to the railroad nor did the Railway assert any open claim to any more land, it did not fence or exhibit any claim to this land necessary to put a purchaser on notice but simply continued to use the single track railroad.

In 1919 the Land Company executed a contract for deed for all of Lot 3 to the petitioner's husband and conveyed the land by warranty deed in 1921 and at which time there was not exhibited any claim of the Railway to any more land than it was using in 1891. Lot 3 was then conveyed to Florida Growers a corporation and the petitioner owned all the stock thereof in 1926 when the Railroad in 1926 entered on this land and took this mile and a half strip to build its double track upon. Florida Growers Company was thereafter dissolved and title to this land went to the petitioner as the sole stockholder.

Failing to take any affirmative action to acquire this land, petitioner was about to bring her vendor's lien suit in 1931 when the Railway went into bankruptcy and procured the stay against suits. She then waited for 15 years for dissolution of the stay order but as it appeared the receivership was to be indefinite she applied to the court to relax the stay and permit her to sue

receivers in a court of proper venue and jurisdiction (Record p. 3).

The hearing on this petition was set in Jacksonville, Florida, and she understood the only matters that would be determined at that hearing was if her claim was a valid existing claim and if it would be unreasonable to ask the receivers to defend such a suit. As there was no basis for any jurisdiction of a federal court to determine anything but the questions above stated and the only reason she ever appeared in the federal court was for leave to sue the receivers and which except for the bankruptcy proceedings would have had nothing to do with the matter, she was not prepared nor were there any issues on the merits of her claim developed.

On the day of the hearing the respondents filed a large mass of objections which on their face showed there was an existing controversy over the title to this land. But these were questions of fact that only the State Circuit Court had any jurisdiction to determine, after allowing both parties due process of law to assert their claims and rebut those of their opponents.

In order to induce the district court to try the contested questions of fact the Railway offered in evidence a great mass of maps and plats and the district court in this summary proceeding assumed jurisdiction to determine such questions and without allowing any issues to be developed or affording the petitioner any opportunity to offer evidence to sustain her claims and rebut those of the respondents.

The District Court held (Record p. 31), that the Railway had acquired title by adverse possession, regardless of the fact there was no such issue and the petitioner had claimed the holding was permissive and subject to the vendor's lien. It also held that she was guilty of laches regardless of the fact the Railway had asked for and the same court had granted the stay against suits.

Absent any tolling of the statute of limitations by the stay order, the time had not run in which the vendor's lien could be enforced so neither of such findings could be held to be responsive. Petitioner therefore filed her petition for a rehearing (Record p. 32) and pointed out that she had not asked leave to sue in ejectment and probably under the Florida law ejectment does not lie if the Railway can lawfully enter without purchase nor did the claim she held a vendor's lien support any such theory. Owners of property don't hold adversely to lien holders but hold subject thereto.

Nor should the court charge the petitioner with laches in not doing what it had forbidden her to do or would have been in contempt had she disregarded the order. That is hardly consistent and furthermore absent any stay order the time had not run within which to bring the suit to enforce the lien.

The rehearing was denied and appeal taken to the Circuit Court and it not only affirmed the District Court but made added findings that the land was in adverse and hostile possession of the Railway when the Land Company conveyed it in 1921.

Where it finds anything in the record to support such a finding of fact that it had no jurisdiction to determine it does not state. However, in the last paragraph of page 17 of the record, in order to support its claims of adverse possession, the Railway claimed that for 25 years it had allowed other corporations with the right of eminent domain to maintain poles and wires on the *east* side of its tracks and which poles were located in Lot 2 and to which land the petitioner asserted no claim. Whether a corporation with the right of eminent domain can acquire title to land of others by adverse possession is not in question but even if it could, it could hardly acquire possession of petitioner's property by

using the property of others. Petitioner's land lay on the west side of the single track and the adverse possession claimed was on the east side of the track.

Due process of law does not contemplate a court that has no jurisdiction of the subject matter or the parties determining their rights in a summary proceedings and without issues developed and allowing each party its day in court nor does the Federal or State Constitutions contemplate that private property be taken for public use without payment or by a corporation going into bankruptcy, issuing an indefinite order to file claims of common creditors (see paragraph 6, Record p. 45) and not notify the petitioner it had dissaffirmed its holding of the land upon which the double track was laid.

BASIS OF JURISDICTION.

Jurisdiction to review a judgment of the Circuit Court of appeals is vested in this court under Title 11, Section 347 (c) to review cases arising out of bankruptcy proceedings and this court has further jurisdiction to review this case under Section 262 of the Judicial Code to inquire into whether the District Court and the Circuit Court of Appeals had any jurisdiction to determine without due process of law, questions of fact that the State Circuit Court for Martin County, Florida, had exclusive jurisdiction to determine.

On the face of the record the questions of fact to be determined by the latter court were whether the land conveyed by the Land Company in 1921 was in adverse possession of the railroad at that time and which in itself appears to be a novel question and what the value of the land was at the time of the taking.

QUESTIONS PRESENTED.

FIRST QUESTION.

Can the district federal court dispose of a contested claim by a summary proceeding in bankruptcy, on an application for leave to sue the bankrupt?

SECOND QUESTION.

Can the federal district court claim that because a Florida corporation is adjudged a bankrupt that extends the jurisdiction of the federal court to hear and determine matters of law and fact that are in the sole jurisdiction of the State Court?

THIRD QUESTION.

Can a federal court construe leave to foreclose a vendor's lien as an application to sue in ejectment and can the equitable rule of laches be applied when on the face of the action the statute of limitations has not run against the claim and under the law of Florida injury from laches are questions of fact to be proven?

FOURTH QUESTION.

If the District court was wrong in assuming jurisdiction and in its judgments, was the Circuit Court of Appeals in error in not only affirming the lower court but also making added findings of fact for which there was no basis in the record?

FIFTH QUESTION.

If the Federal and State Constitutions forbid taking private property for public use without payment, can one with the right of eminent domain proceed by indirection and acquire such property by any other method?

SIXTH QUESTION.

Was the respondent guilty of padding the record on appeal?

STATEMENT OF EVIDENCE.

There is no evidence other than the mass of exhibits offered in evidence and included in the record by the respondents. The petitioner was never given any opportunity to offer any.

OFFICIAL OPINIONS.

The decisions of the Federal District Court do not appear to be reported but they appear on pages 31 and 37 of the record. The opinion of the Circuit Court of appeals also is included in the record on appeal.

REASONS RELIED UPON FOR WRIT OF CERTIORARI.

I.

The decisions of the courts below are in conflict with the decisions of this court and those of the Circuit Court of Appeals for all other Circuits and in conflict with the petitioner's Federal Constitutional rights in denying her due process of law, her right to a jury trial and taking her property for public use without payment.

Barber Asphalt v. *Standard Asphalt*, 275 U. S. 372.

Barton v. *Barbour*, 104 U. S. 126.

Hill v. *Gordon*, 45 Fed. 276, 149 U. S. 775.

Kindred v. *U. P. R. R. Co.*, 255 U. S. 591.

May v. *Henderson*, 268 U. S. 111.

Nor. Pac. Rlwy. v. *Smith*, 171 U. S. 260.
Nor. Pac. Rlwy. v. *Concannon*, 239 U. S. 382.
Peale v. *Phipps*, 14 How. 368.
Slide & S. Gold Mines v. *Seymour*, 153 U. S. 509.
Williams v. *Parker*, 188 U. S. 891.

Circuit Court of Appeals Cases.

Re Barnes, 203 Fed. 883.
Buler v. *Schumacher*, 71 F. 2d 831.
Donneaux v. *Fox*, 300 Fed. 800.
Field v. *Kansas City Ref. Co.*, 296 Fed. 800.
First Trust v. *Baylor*, 1 F. 2d 24.
Re Lane Lumber Co., 217 Fed. 550.
Re Makin, 28 F. 2d 417.
Morgan v. *Patillo*, 297 Fed. 140.
Maxwell v. *Engrebretzen*, 74 F. 2d 93.
Re Nine North Church St., 82 F. 2d 186.
Re Roberts, 16 Fed. Supp. 424.
Re Wakley, 50 F. 2d 869.

In *Nor. Pac.* v. *Concannon*, 239 U. S. 383, the court held that under the restraint of the Constitution a carrier with right of eminent domain cannot acquire private property for public use by adverse user. And as the *Makin case* points out, 28 F. 2d 417, that where there is no diversity of citizenship the claimant is entitled to a plenary suit in the state court to determine contested matters of law and fact.

In *Hill* v. *Gordon*, 45 Fed. 276, and appeal dismissed 149 U. S. 775, it was held that a delay of 20 years by a lienholder did not bar the right to enforce the claim and laches was not a defense. Furthermore, the Florida courts hold that laches is a question of fact to be proved and show injury from the delay and the federal courts

sitting in Florida where they have jurisdiction are required to follow such rule.

II.

The decisions of the courts below are in violation of the petitioner's State Constitutional rights and are in conflict with the decisions of the State Supreme Court ruling on similar questions.

Secs. 1-12 of the Florida Declaration of Rights.

Article Four and Article Sixteen, Section 29, of the State Constitution assures the petitioner, that the courts of that state will always be open to hear her claims and justice will be administered without sale, denial and delay. That her property will not be taken for public use without payment and she will be afforded due process of law.

Federal Land Bank v. *Brooks*, 190 So. 737.
Florida Sou. Rlwy. v. *Hill*, 23 So. 566.
Florida Cent. Rlwy. v. *Bell*, 31 So. 259.
Getzen v. *Sumter County*, 103 So. 104.
Hillsboro County v. *Kensett*, 144 So. 393.
Miami v. *F. E. C. Rlwy.*, 84 So. 726.
Palmetto v. *Katch*, 98 So. 352.
Rosenbaum v. *State Road Dept.*, 177 So. 220.
S. A. L. R. R. v. *Spec. R. & B. Dist.*, 108 So. 689, 46 A. L. R. 870.
Sarasota v. *Dixon*, 1 So. 2d 198.
Wilken v. *Grove*, 19 So. 2d 534.

As stated in *Cone Bros.* v. *Moore*, 193 So. 288, Laches in equity suits in Florida is *a question of fact* and in *Wilken* v. *Groves*, 19 So. 2d 534, the facts must show the defendant has been injured, embarrassed or placed at a disadvantage by the delay. And as stated in *Sarasota* v. *Dixon*,

1 So. 2d 196, if the property is in the hands of a court receiver laches and statutes of limitations *do not run* in respect to possession or the right of possession of such property.

It might be further pointed out that when this same district judge was on the Florida Supreme Court he wrote the opinion in *S. A. L. R. R.* v. *Special R. & B. Dist.*, 108 So. 689, and after a review of cases all over this country he held that adverse possession could not be claimed by or against a carrier especially where the land was a grant. However it might be pointed out the claim of adverse possession was a straw man raised by the court on its own motion. The law gave the petitioner no other election than to claim the taking was permissive and claim a vendor's lien for the value and vendor's liens in Florida are good for 20 years. *Shaylor* v. *Cloud*, 57 So. 666, 1914A, Ann. Cas. 277; *Sonderberg* v. *Davis*, 159 So. 23, and *Rosenbaum* v. *State Road Dept.*, 177 So. 20.

III.

The circuit court of appeals has so far departed from accepted procedure and has also sanctioned a departure from accepted procedure in an important matter affecting procedure generally, in cases rising out of bankruptcy proceedings, throughout the country, as to call for the exercise of supervision by the Supreme Court.

As stated in Justice Miller's dissenting opinion in *Peale* v. *Phipps*, 14 How. 368, and later recognized by Congress, that because a corporation becomes a bankrupt and a federal court appoints a receiver does not enlarge its jurisdiction nor does it deny the right to a jury trial in the state court if there is no diversity of citizenshp.

Nor does it confer dictatorial powers of federal district judges to try and determine in a summary trial

whether or not a claimant can prove her claim in the State Court, deny her due process of law and refuse to relax his orders against bringing suits for no good cause shown and deprive her of her state constitutional right or assurance that the courts of Florida would always be open to hear her claims and justice would be administered without sale, denial or delay.

Due to the rather strained construction of the State Constitution and the effect of delay in bringing a suit to enforce a claim for payment for land taken where the state statute permits or authorizes a railway company to enter upon private property without any other claim of right, take what it needs to perform the functions for which it was chartered to perform and at the same time observe the restraint against taking private property without payment makes it necessary that this court speak on that question when such a matter arises in the federal court solely due to the fact a Florida corporation became bankrupt and the federal courts having exclusive jurisdiction of bankruptcy proceedings, appointed receivers for that corporation and issued an injunction against suits against its own appointees without its permission.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this court directed to the United States Circuit Court of Appeals for the 5th Circuit, commanding that court to certify and send to this court for review and determination, on a day certain to be named therein, a full and complete transcript of the record and proceedings; if the transcript already filed be deemed insufficient, in the cause entitled J. K. Dunscombe, appellant, vs. Scott W. Loftin and John W. Martin, trustees for debtor, Florida East Coast Railway Company, appellees, and that the judgment of the said Circuit Court of Appeals and the United States Dis-

trict Court for the Southern District of Florida in said cause by this court be reversed and petitioner have such other and further relief as this court may determine.

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BRIEF.

ARGUMENT.

Preamble.

The complaint here is that a Federal District Court that had no jurisdiction of the subject matter in a cause arising out of a bankruptcy proceeding went into the merits of the controversy in a summary proceeding and without allowing due process of law determined the rights of the petitioner without any evidence and contrary to the law of the State in such cases and which laws should have been applied if the Federal Court had any jurisdiction to hear the matter.

That the C. C. A. on the appeal sustained this type of procedure and in addition made findings of fact and for which there was nothing in the record to support, and no such questions were even before it on the appeal from the District Court.

It might here be pointed out that the petitioner never made any attempt to bring a suit in the federal court, could not have maintained one had she done so and the only reason she appeared in the Federal Court was to ask that court to relax its injunction against suing the bankrupt, and which stay had been prolonged long beyond the dictates of any need therefor and was in fact a violation of her State Constitutional rights under Section 4 of the Florida Declaration of Rights which assured her the courts of that state would *always be open to hear her demands* and administer justice without *denial,* sale or *delay.*

that because some corporation becomes bankrupt and a petition in bankruptcy is filed in the Federal Court does not give that court added jurisdiction to hear and determine matters it is not given jurisdiction to otherwise hear.

The question involved was whether the Florida East Coast Railway Company ever acquired title or right of use of a part of its right of way, that the applicant for leave to sue in State court held had been appropriated without payment or payment secured.

Without being permitted to bring any suit or allowed any opportunity to present her claims and offer evidence to support them and testimony to rebut the claims of the Railway the District Court in a summary proceeding, determined all the issues of law and fact without any evidence to support such findings and raised and determined questions that were not before it.

The C. C. A. on the appeal fell into the same error and even went further and such procedure is in conflict with all the decisions of this court and in conflict with the decisions of the other C. C. A.'s this matter is brought up here on certiorari in order that this court can rectify and correct such variance.

Why it is even necessary for this Railroad to continue in bankruptcy for 15 years; when it is far more prosperous than it ever was before it was adjudged a bankrupt, this petitioner is not interested in, except for the fact that during this period the injunction against suits of this nature continued and to avoid being held in contempt of court she had to make the application to sue.

The purpose of citing the Florida Supreme Court decisions as to the law in such cases is simply to point out to this court that had the Federal Court any jurisdiction of the matter and had applied the law of Florida, it could not have been sustained.

If the applicant for leave to sue claims to hold a vendor's lien for the value of the property taken and not paid for and the defense is the railway has acquired title by adverse possession such a defense is not appropriate because debtors who have liens on their property don't hold adversely but hold subject, nor according to the decisions of this court and the Florida Supreme Court can a corporation with the right of eminent domain, acquire title to property in this manner and not violate the constitutional restrictions against taking private property for public use, especially where a state law authorizes the corporation to enter and take, without making any attempt to acquire or condemn.

How the C. C. A. could find that the property was in adverse possession of the Railway when the Land Company executed its deed in 1921, when that was a contested fact and which leave was asked to be established in the suit in the State Court and such leave denied; with no evidence in the record to support it; appears to be a serious prejudgment based on an unsupported conclusion.

Or how the court could find the applicant was guilty of laches in applying, when it had forbidden her to sue and laches under the Florida law was a question of fact and no evidence had been adduced to show any injury from the alleged delay.

The foregoing may give the court a better insight into this matter and show why the errors are assigned.

Art. XVI, Sec. 29, of Florida Constitution:

No private property, nor right of way shall be appropriated to the use of any corporation or individual until full compensation therefor shall first be made to the owner or first secured to him by a deposit in money; which compensation irrespective of any benefit from any

improvement proposed by such corporation or individual, shall be ascertained by a jury of 12 men *in a court of competent* jurisdiction, as shall be provided by law.

Sibley v. *Volusia County*, 2 So. 2d 578.

In condemnation proceedings whether any necessity exists for taking particular property for purpose alleged in the petition is ultimately a judicial question on which the owner of the property is entitled to be heard.

But if as in this case the carrier pays no attention to the Section of the Constitution, appropriates the private property without paying or securing the compensation and makes no effort later to acquire it, as under Section 73.09 it can then by indirection accomplish what is forbidden to do directly and that is:

1. Take it without paying or securing compensation.

2. Deprive the owner of his property without due process of law.

3. Deprive him of his trial by a jury of 12 men because even if the owner elects to bring ejectment in Florida that is tried by a jury of 6 men.

4. Deprive him of his right to attorney's fee as the one who brings a condemnation suit in Florida has to pay the defendant a reasonable attorney's fee for the defense.

5. Deprive him of his right to any jury trial by requiring him to claim a vendor's lien.

Hillsboro County v. *Kensett*, 144 So. 393, where limitations or laches were attempted to be pleaded as a defense to vendor's lien claim for property taken for public use without payment, held that any such act would be unconstitutional as in opposition to this section of the

Constitution and which is probably one basis for the holding that private property cannot be acquired by adverse possession by a corporation with the right of eminent domain.

Sec. 12 of Florida Declaration of Rights:

No person shall be subject to be twice put in jeopardy for the same offense, or compelled in any criminal case to be a witness against himself, *or to be deprived of* life, liberty *or property* without due process of law, *nor shall private property be taken* without just compensation.

Rosenbaum v. *State Road Dept.*, 177 So. 220.

The provision of this section as to payment of just compensation for property taken is mandatory and applies to *every corporation* or individual appropriating the property of another.

Hillsboro County v. *Kensett*, 144 So. 393:

Mary Kensett in 1925 was the owner of certain land and in that year Hillsboro County entered upon it, threw up a grade and built a road across her land without purchase or condemnation. While nothing prevented her from bringing a suit she waited until something over five years later and then started her vendor's lien suit.

One of the objections to this action was, was it barred by Sec. 4665, C. G. S., which required a claim for land taken by a county for road purposes to be filed with the County Commissioners within a year after the taking. The court pointed out under the 8th headnote that such a statute was in conflict with Art. XVI, Sec. 29, of the State Constitution but that a demand would have to be made against the County for payment and refused before a suit started.

that the only bar to such a suit is by a lawful, statute of limitations *applying to the suit itself*, or by general principles of laches when the suit is equity.

Under the due process portion of the above section the Florida Supreme Court's construction of the section in *Spafford* v. *Brevard County*, 110 So. 451.

Due process of law demands that the owner of the land should have reasonable notice and opportunity to protect rights before appropriation is adjudged.

State ex rel. Moody v. *Baker*, 20 Fla. 616:

Nor does the act have to authorize the landowner the right to institute proceedings in case the company fails to do so.

Reference to Reported Opinions to Support the Judgments of the Federal Courts.

The case of *Florida Sou. Rlwy.* v. *Loring*, 51 Fed. 932, was cited by both the district and circuit courts of appeals (Loring brought ejectment), but that holding has since been nullified by the enactment of Sec. 73.05, F. S. A., which gives the carrier the right to enter private property without making any attempt to first acquire such right by purchase, condemnation or any proceeding and by the State Supreme Court's construction of the law and Constitution that the remedy of a person whose property has been taken in such manner is to go into equity to enforce a vendor's lien for the value of the property.

Furthermore even those who can acquire property by adverse possession have to put the owner and subsequent purchasers on notice by fencing and clearing the land and take other steps that show open and notorious possession and a few claimed markers, which it is denied exist, would not be a sufficient notice to base such a claim on even if

possession or title could be acquired in such manner by a corporation that has the right to enter regardless of the wishes of the owner.

As to the Cases Cited by the C. C. A.

Aside from the Florida Central case the Circuit Court of Appeals cited *S. A. L. R. R.* v. *A. C. L. R. R.* and which is controlled by an entirely different statute. That is not the case of taking private property but where two corporations with the right of eminent domain have a controversy over their conflicting claims.

That case points out that statute and also points out that the S. A. L. had admitted or agreed the extent of its conflicting claim and all the A. C. L. did was quiet its title to the land the S. A. L. had agreed A. C. L. had a better right to. See *S. A. L.* v. *A. C. L. R. R.*, 158 So. 459.

The petitioner has no quarrel with the cases cited under Section C of the opinion of the C. C. A. But she claims it has no right to prejudge her claim and deny her the right to prove in the state court and rebut the claims of the Railway that it could acquire title in this manner or that she was not entitled to a vendor's lien or that if adverse possession could be made an issue that it had done the things necessary to put her on notice when she purchased.

QUESTIONS PRESENTED.

FIRST QUESTION.

Can the Federal District Court Dispose of a Bona Fide Contested Claim by a Summary Proceeding in Bankruptcy on an Application for Leave to Sue?

Apparently the federal court acquired jurisdiction of the bankrupt in 1931 under Title 11, Sec. 202, and contin-

ued under that title until March 3rd, 1933, under 77B and on August 27th, 1935, 77B was superceded by Title 11, Sec. 205. But under none of these acts or the amendments thereof does the district court by implication have any jurisdiction to determine controversies between citizens of the same state just because one happens to be in bankruptcy. And such contests cannot be determined by the Federal Court by summary proceedings or otherwise.

There is considerable conflict between the various Circuit Courts of Appeal as well as in various states of the construction of the Federal Bankruptcy Act as to whether permission to sue a receiver is even necessary.

Donneaux v. *Fox,* 300 Fed. 800 (Fla.), says no permission to sue is necessary.

Field v. *Kansas City Refining Co.,* 296 Fed. 800, and 9 F. 2d 313, holds that if the contest is over the title to land occupied by railroad tracks, permission to sue is necessary.

C., R. I. & P. R. R. v. *Quatanna,* 120 F. 2d 226, 8th Circuit says that such suits cannot be brought without consent of the court.

Re C. E. I. R. R., 121 F. 2d 785, 7th Circuit:

It is better to obtain consent but it is not necessary, however it had given its implied approval by authorizing the receiver to defend the case.

Ohio Oil v. *Thompson,* 120 F. 2d 831:

This suit was originally brought in the State Court by the railroad and the defendants filed a counterclaim in the State Court. It was held the suit *should proceed* in the State Court.

In other words because the corporation became a bankrupt the jurisdiction of the Federal Court was not ex-

tended to determine controversies that would have otherwise been tried in the State Court.

In fact Sec. 205 of Title 11, expressly indicates that while the district court can enjoin suits, other than those arising out of the operation of its cars and busses, it has no jurisdiction of such suits if there was no jurisdiction otherwise and any suits that had been transferred under any such belief should be remanded to the State Court. This act could only be construed as an injunction against the Federal Court attempting to assume jurisdiction of such questions.

Gutersohn v. *R. C. & S. R. R. Co.*, 140 F. 2d 755, indicates that if a suit is commenced without permission the district court can enjoin its prosecution which would indicate that permission is necessary.

Hooper v. *M. O. P. R. R.*, 177 S. W. 2d 755, says consent must be obtained.

Snow v. *Thompson*, 178 S. W. 2d 796, says no consent is necessary to sue.

The petition for leave to sue (Record p. 3), in no way asked the court to inquire into the merits but only attached a copy of the proposed complaint for the purpose of showing what the cause of action was and with the intention of bringing that suit in the State Circuit Court for Martin County, Florida.

The trustees were residents of Florida and the debtor was a Florida corporation, the applicant was a Florida resident and the *res* was located in Martin County, Florida.

Buler v. *Schumacher*, 71 F. 2d 831, 296 U. S. 367:

Courts cannot determine by summary proceedings, disputed facts and controverted issues of law and claimant is entitled to a plenary suit. Also *May* v. *Hender-*

son, 268 U. S. 111; *Re Barnes*, 202 Fed. 883; *Re Roberts*, 16 Fed. Supp. 424; *Maxwell* v. *Engrebretzen*, 74 F. 2d 93.

In other words if there is no basis of federal jurisdiction and there is a *bona fide* contest then the applicant has the right to sue but the action must be brought in the State Court.

It might be pointed out that under the law as to carriers as construed by the Florida Supreme Court where a corporation with the right of eminent domain has unlawfully appropriated property and a suit in ejectment or vendor's lien foreclosure action started to enforce the payment, the carrier can always get a stay of such an action in the State Court, as will be pointed out under the 5th question.

However the rule is that such injunctions should not be continued any longer than is necessary.

First Trust v. *Baylor*, 1 F. 2d 24:

The injunction against the enforcement of liens should not be perpetual and in case of long delay, restraining order should be modified to permit foreclosure. See *Re 9 North Church St.*, 82 F. 2d 186.

This would be especially true in Florida because Sec. 4 of the Constitution assures its citizens its courts will always be open to hear their demands and justice shall be administered without *denial*, sale or *delay*.

It would therefore seem a grave question whether a federal district court sitting in Florida could issue an order that denies such constitutional guarantees.

SECOND AND THIRD QUESTIONS.

Can a Federal District Court Claim That Because a Corporation That Is Organized under the Laws of the State in Which That Court Sits and Is Adjudged a Bankrupt by That Court, Extend Its Jurisdiction to Hear and Determine Matters of Law and Fact That Except of the Bankruptcy Proceedings Are Within the Sole Jurisdiction of the State Circuit Court and the Venue Is in the County Where the Land in Question Is Situated?

While the Florida law is silent on the remedy of a private person whose land has been appropriated without payment; by a corporation with the right of eminent domain, the court has pointed out and consistently held that such an owner can waive the tortious taking and elect to declare a vendor's lien for the value of the property so taken and go into equity and foreclose this lien. *Florida Central R. R.* v. *Bell,* 31 So. 259; *Hillsboro County* v. *Kensett,* 144 So. 393; *State Road Dept.* v. *Rosenbaum,* 177 So. 220, and cases therein cited.

In Florida a vendor's lien is good for 20 years when there is any applicable statute of limitations and it has not been tolled by the court having possession of the property.

The further rule in Florida is, *Hill* v. *Gordon,* 45 Fed. 276, appeal dismissed 149 U. S. 775:

> "A lien cannot be divested by adverse holding for the statutory period in Florida, as holders of the title do not hold adversely but hold subject."

As the court pointed out in that case where a judgment lien was good for twenty years the holder was not guilty of laches because he did not seek to enforce his lien sooner, as long as he sued within the 20 year period.

Absent any tolling of the statute by the court forbidding suits and keeping this injunction in force for fifteen years, the time had not expired when she asked permission to enforce the lien.

Due to the conflict of decisions as to whether any leave to sue was necessary and in view of the State Constitution provision that the state court would always be open, the application was more one of courtesy to the federal court but the reaction appeared to be that it was an outrage to even suggest the debtor that had been under the court's wing for some 15 years should be required to defend a claim for payment of land it had taken and not paid for.

Of course under the law of Florida laches can be pleaded as defense but must be proved and the defendant show in what manner it suffered injury by the delay or has been disenabled to defend by the long delay.

Fla. Mtg. Invest. Co. v. *Finlayson,* 91 Fed. 13, certiorari denied 174 U. S. 801:

Equity follows the law as to limitations; and where the life of a judgment is 20 years under the statute, the holder of such a judgment *will not be held guilty of laches* that will authorize a court of equity to set aside a sale of land thereunder and made within such time.

Cone Bros. v. *Moore,* 193 So. 288:

Laches is primarily a *question of fact* to be determined by the circumstances, surroundings and conditions in each case.

Sarasota v. *Dixon,* 1 So. 2d 198:

Laches and statutes of limitations do not run as respects possession or *right of possession* of property which is in the court through custody of its receivers.

Holliday v. *Wade*, 117 F. 2d 154:

Equity will generally apply to legal claims the legal limitations for time of action thereon.

P. W. Wilken v. *Grove*, 19 So. 2d 834:

The test of laches is whether delay has resulted in injury, embarrassment or disadvantage to any person, particularly the defendant.

Shaylor v. *Cloud*, 57 So. 666, 1914A Ann. Cas. 277.

Sonderberg v. *Davis*, 159 So. 23:

A vendor's lien is good for twenty years and is similar to a purchase money mortgage.

Even had the statute not been suspended by the court taking possession of this property and issuing its stay order still the twenty years period had not expired when leave was sought to enforce the lien. But if leave to sue had been granted that would not have been a defense in the State Court and furthermore even had the district court any jurisdiction to determine this question the judgment was not responsive. Apparently the court contorted the application to enforce the vendor's lien as one to sue in ejectment because adverse possession would not run against a lien holder and even then, the seven year statute of limitations had not run against ejectment because the Railway was adjudged a bankrupt in 1931 and only five years had run before the statute was tolled by the court forbidding suits, even if a corporation with the right of eminent domain could acquire the property of others in such manner.

In any event the district court had no jurisdiction to determine the matter and much less without proof of any injury. A secured creditor does not have to file any claims in a bankruptcy proceeding, he can sit by and do nothing

and wait for the bankrupt to emerge, lawful liens are not divested in such proceedings but only personal liability.

If the carrier wanted to disaffirm its holding it could give back the land and notify her, if it wanted to adjust her lien it could make some proposal, but if it wanted to perfect its title all it had to do was proceed under Sec. 73.09, F. S. A., but failing to make any attempt her only remedy was to ask leave to foreclose it.

FOURTH QUESTION.

If the District Court Was Wrong in Assuming Jurisdiction and in the Rendition of Its Judgments, Was the Circuit Court of Appeals in Error in Not Only Affirming the Lower Court But Also Making Added Findings of Fact That the Land Was in Adverse Possession of the Railway When the Land Company Executed and Delivered Its Contract and Deed?

The petitioner's contention is and in support thereof adopts the argument under the second question, that if the district court had no jurisdiction of the merits of the case or the parties or the subject matter of the controversy and there was no diversity of citizenship between the parties and no federal question involved or any basis of federal jurisdiction and there was nothing in the record that would tend to show any reason why a plenary suit should not be brought in the State Court, then the Circuit Court of Appeals should have reversed the case, assessed the appellee for padding the record and remanded it to the district court with instructions to grant the application to sue.

That was the only issue involved, but it not only adopts and affirms the lower court's findings of fact, obtained without any evidence to support them, but even finds itself, that the Railway Company was in open, hostile

and notorious possession of the strip of land in 1919 when the Land Company executed its contract and in 1921 when it executed and delivered its deed. How such findings of fact can be determined without any evidence or anything in the record to support them, even if either court had any jurisdiction to determine such questions, were due process of law afforded, the issue developed and each party were allowed their day in court. The Railway claimed it had maintained its poles in Lot 2 or on the east side of its track but that was immaterial because even if maintaining a pole line constitutes anything but adverse possession of the land upon which the poles stand and such corporations also have the right of eminent domain, still the land in question is on the west side of the track in Lot 3 of the Grant.

But in this case the district court sitting in Jacksonville, Florida, 265 miles away can determine without any evidence that the Railway in 1919 was in adverse possession of a strip of land a mile and a half long in 1919 and 1921 and the Circuit Court of Appeals in New Orleans can also make the same finding and therefore hold the deed was void, presents a novel method of trying the title to real property. The allegations were that the Railway entered this land without lawful claim of right in 1926 and took possession of it.

Under any theory of due process of law the Railway was entitled to deny such allegations and raise an issue and both parties allowed a trial in the State Court, or if the Railway elected to claim the benefits of Sec. 73.09, F. S. A., it could get its stay and condemn this land but by the method of procedure followed in this case the applicant's title is determined in an *ex parte* proceeding on a simple motion to relax a long continued and unreasonable stay order.

The Railway Company sought and obtained the stay order and the district court granted it and under any theory of estoppel the Railway was estopped to suggest laches and the District Court estopped to impute laches for failing to do what it had forbidden, and which was not applicable. But the gist of the appellate court's judgment in sustaining the lower court was on such unsupported finding of fact and which neither court had any jurisdiction to determine.

FIFTH QUESTION.

If the Federal and State Constitutions Forbid Taking Private Property for Public Use Without Payment, Can a Corporation with the Right of Eminent Domain Proceed by Indirection and Acquire Such Property by Any Other Method?

The limitations as to taking private property for public use without payment, applies to the Federal government but where the State Constitution contains a similar restriction it applies to those claiming that power through the state and then the Federal Court would have to apply the state court's construction of that restriction in any action that was properly before such court.

Section 1 of the Florida Declaration of Rights provides that among the *unalienable rights* of its citizens is the right of acquiring, possessing and protecting property and to equal protection of the laws.

Section 12 of the same Declaration is similar to the same provision in the Federal Constitution and forbids taking private property for public use without payment. The method set out for taking such property for such use is under Chapter 73.00, F. S. A.

In *Williams* v. *Parker,* 188 U. S. 491, this court held in construing the Massachussetts Constitution that Massachusetts

> "May authorize the taking of private property for public use, prior to any payment or even before the amount of payment has been determined. That was a case in which the City of Boston was enforcing building restrictions and the socalled inexhaustible taxing power to pay any judgment was present. However, when you deal with bankrupt public service corporations another question is presented."

But as that opinion stated, citing *Sweet* v. *Retchel,* 159 U. S. 380; provided, adequate provision is made for payment of any resulting judgment.

It is not here contended that any Federal Court was required to or had any jurisdiction to construe this question, had the application to sue been granted the case would have proceeded under Chapter 73, F. S. A., in the state court if the Railway wanted to get a stay in the vendor's lien action and proceed under Section 73.09 which is as follows:

In any case where the petitioner *shall not have acquired title* to any lands the petitioner is using, or if at any time after attempt to acquire title by condemnation proceedings or otherwise, it shall be found that the titles so acquired are defective, the petitioner may proceed under this chapter to acquire or perfect such title, *or acquire any outstanding right, title* or interest in and to such property, provided, however that the compensation to be allowed the defendants shall be just compensation for the property or right, title or interest then taken as of the date of the appropriation.

Section 73.01 sets out the form of action and method to be pursued, Section 73.10 provides for a trial affording

due process of law to develop the issues, 73.11 provides for a 12 man jury, and 73.12 for a conditional judgment, no title to pass until it is paid.

The court will note that ample provision is made for the protection of the owner if the condemnor first seeks to acquire title before it enters. But if as in this case it enters and makes no attempt to acquire title where in 73.09 is there any kind of provision for payment to the owner and does this also afford equal protection of the law?

Such a statute invites what would otherwise be an unlawful trespass, why bother to condemn and make yourself liable to obtain a conditional judgment, when it can simply enter without making any attempt and avoid any expense of litigation. Once in possession, the court will not disturb the possession no matter how it was obtained if that would disrupt the public service.

All the owner can do in that case is to protest, the statute made no provision for payment nor does it inflict any penalty for such abuse of power delegated. All it has to do is enter as it did in this case, it could not be liable for any greater damage than if it had condemned it in the first place, so in the absence of any statute for the protection of the owner the Florida court first developed the action of ejectment.

J. T. & K. W. R. R. v. *Adams*, 9 So. 2.

Ejectment lies against a railroad to recover property taken without authority.

But it later developed the vendor's lien action as being a more adequate remedy and under the theory that equity would see no wrong without a right and would raise an obligation to pay for what was taken.

Fla. So. Rlwy. v. *Hill,* 23 So. 566, and still approves this procedure, see *Rosenbaum* v. *State Road Dept.,* 177 So. 220, and cases therein cited.

But as stated in *J. T. & K. W. R. R.* v. *Adams,* 10 So. 465, 14 L. R. A. 533, whether the owner brings ejectment or elects to claim a vendor's lien the carrier can always get a stay in those suits and then proceed to do what it should have originally done and proceed under 73.09 or it can allow the vendor's action to proceed and after final decree get a stay of execution if the sale of its track would disrupt the service it is required under its charter to provide.

So under this law, no provision is made for payment of compensation where the carrier simply appropriates the land nor does it afford equal protection of the law if there are no limitations running against the carrier within which it can seek to proceed under Section 73.09.

If there are no limitations running against it there can be none running in its favor, absent any prohibition as to taking private property without payment. Under any theory of equal protection of the law you can't pass acts that restrict certain classes and not make it apply in equal force to others.

But even in cases of private parties who do not have the right of eminent domain, it takes seven years open, hostile, notorious and continued possession to divest the owner's title and if in the meantime the court takes possession of the property and stays suits against its receivers that tolls the statute. *Sarasota* v. *Dixon, supra.*

The complaint alleged the land was appropriated in 1926 and in 1931 the court took possession and stayed suits, and the undissolved stay order was what caused the applicant to appear in the federal court. The federal court had continued an uninterrupted possession through its receivers since 1931 and yet it found the applicant was

guilty of laches regardless of the fact that under the Florida law laches do not run in such cases and that the Railway had acquired adverse possession, regardless of the fact the seven years statute had been tolled and the court had forbidden her to enforce her claim without its consent.

But it is contended that not only did the federal court have no jurisdiction to determine this question but its judgment was not responsive and that laches in Florida are a question of fact and must be pleaded and proved. But you can't accomplish by indirection what the Constitution directly forbids so somewhere along the line the owner has to be compensated.

Rogers v. *Toccoa Power Co.*, 131 S. E. 517, 44 A. L. R. 534:

> "But compensation must be paid to afford due process of law."

N. P. R. R. Co. v. *Concannon*, 239 U. S. 382, 50 A. L. R. 304:

A corporation with the power of eminent domain cannot acquire property by adverse possession. See *Collinsville Coal* v. *B. & O. R. R.*, 65 Atl. 669.

The district judge when a member of the Supreme Court of Florida wrote the lengthy opinion in *S. A. L. R. R.* v. *Spec. R. & D. Dist.*, 108 So. 689, 46 A. L. R. 870.

In that case the public, through the Road and Bridge District that had the power of eminent domain, claimed to have acquired title to part of the carrier's right of way by adverse user. The court made a thorough investigation, cited federal and state cases from various parts of the country and came to the conclusion that adverse possession could not be obtained by or against one that had the right of eminent domain, had exercised it and

lawfully acquired its title. It cited two cases where adverse user by one without the right of eminent domain had fenced and acquired title against the carrier but refused to accept such decisions and held that the use was only permissive.

Then let us examine *Palmetto* v. *Katch*, 98 So. 352:

The Railway was claiming under a dedication, although there was none, and as the Supreme Court of Florida pointed out in the Palmetto case, that where there was a dedication, *that is not a deed*, conveys no title, but is simply an offer of use and if not accepted can be revoked by conveying the property at any time before the acceptance. So the real question of fact that had to be determined was, had the Railway accepted the offer of use, if for the sake of argument the reservation on the Land Company's plat could be construed to be a dedication.

Let us then examine *Miami* v. *F. E. C. Rlwy.*, 84 So. 726, in which case the Florida Supreme Court set out what steps had to be taken to show an acceptance of a dedication.

In that case the Railway had filed a plat and designated a certain area as a "park." The City brought ejectment, the issue was not determined in a summary manner, all parties had their day in court and the defense of the Railway was there had been no dedication and even if marking the area as a part, could be considered a dedication, there had been no acceptance. The Court sustained this defense and pointed out the steps required to put the owner on notice, his offer of use had been accepted.

Of course the case before the court is even stronger because in that case private property was not being taken for public use and the City had its day in court but

where is there any testimony in this record of what acts of acceptance had been taken before the Land Company sold this land, gave its deed and so revoked the dedication, even if there was one.

Assume the Railway had been bankrupt at that time and the City sought leave to bring ejectment from the federal court, there still would have been no basis for federal jurisdiction to determine the question and even had the Railway *pleaded* a perfect defense and set out all the absence of acts necessary to show an acceptance, still the City would have been entitled to rebut those claims, and require the Railway to prove them and on its part show it had accepted the offer of use by competent sworn evidence. The Federal court could hardly determine the right or title to that property in what in fact is an *ex parte* proceeding simply based on the allegations in the pleadings.

Just how a federal judge sitting in Jacksonville, Florida, some 265 miles distant could determine whether the Railway had done the things to show an acceptance in 1919 or 1921 and how the Circuit Court of Appeals in New Orleans can reach the same conclusion or find that the land was in adverse possession of the Railway Company in 1919 or 1921 when the deed was executed and delivered by the Land Company, with no testimony of any kind in the record, even if it had jurisdiction to determine this question, this court may be able to answer.

Certainly placing telephone and telegraph poles on Lot 2 of the Grant by other corporations with the right of eminent domain would not show any claim of possession to Lot 3 and the latter lot was the one in contest. Nor would adverse possession by the A. T. & T. even if it could acquire private property in that manner extend such title to the Railway Company. However those are ques-

tions for the State Court to determine by appropriate procedure.

SIXTH QUESTION.

Was the Respondent Guilty of Padding the Record on Appeal?

The answer to this question would be limited to the extent of the jurisdiction of the federal court to inquire into the matter.

The petitioner's contention is, that jurisdiction simply extends to ascertaining if the claim is *bona fide* and there is an actual contest of issues that must be determined in some court. It does not even extend to determining if the carrier can pay the judgment if rendered because it can always get a stay from the state court if its enforcement would disrupt the public service.

Re Makin, 28 F. 2d 417:

> "Where a substantial lien was claimed on land the trustee asserted title to, the bankruptcy court was *without summary* jurisdiction, and *where there is no diversity* of citizenship *the plenary suit must* be *brought in the State Court.*"

The only question involved on the appeal, was if the district court had summary jurisdiction to determine a *bona fide* contest between residents of the same state and if the objections of the Railway showed any valid reason why the injunction to sue should not be relaxed.

The burden was on the appellant to get up the record and only include such parts as were necessary to determine those questions, if she failed to include sufficient of the record to support the questions raised that would have been her loss. In observation of Rule 75 and the rules of the Fifth Circuit, she filed her directions as to making up the record (Record p. 41). The appellees filed no cross assign-

ments of errors, but then came in and filed directions to include a great mass of irrelevant maps, plats and claims of common creditors. Most of which exhibits would not have been competent evidence in the State Court and certainly had no place in this record, other than to try and get before the court in a summary proceeding for leave to sue, matter that might support a judgment in a plenary suit.

That regardless of the appellant's objections to the inclusion of this matter, the district court on page 81 of the record not only approved but ordered this be included in the record; "In order this *evidence* considered by the court in making its finding."

This so called evidence, was according to the law, not competent for the district court to examine. The Railway filed its objections to allowing the petitioner leave to sue, that showed there was an existing *bona fide* contest that had not expired by any statute of limitations.

It was not a colorable claim or fraudulent or made by the bankrupt or anyone in connection with it. Furthermore federal courts are restricted against the enjoining of state laws and when the State Constitution assured the petitioner its courts would always be open to hear her claim without denial or delay that also had to be considered and what this stay order in effect produced was the denial of a right guaranteed by the State Constitution.

But the contention is that because the district court exceeded its jurisdiction and examined into the merits of the controversy, was no reason to sustain the appellees' motion to include all this irrelevant matter in the record in order to sustain findings of fact it had no jurisdiction to make.

The Railway had never disaffirmed its holding of this land and as a secured creditor for whom no adjustment was offered she was not required to file any claim or objections because no adjustment had been offered her.

6 Amer. Jur. 583; 79 A. L. R. 389; 94 A. L. R. 472:

"A secured creditor if he chose may stay out of the bankruptcy proceedings entirely and look to the security alone for the payment of his debt."

Re Wakley, 50 F. 2d 889, 75 A. L. R. 1521:

Instead of asking permission to sue the receiver, in this case the lien holder asked the bankruptcy court to order payments be made on his claim. The objection was the claim came too late. But the district court was reversed as a secured creditor did not have to file his claim and right to sue was suspended when the court took possession and the applicant was *not guilty of laches.*

Re Lane Lumber Co., 217 Fed. 550:

"An unrecorded vendor's lien *is superior* to anyone claiming under the purchaser except an incumbrancer or purchaser in good faith and is good against a trustee in bankruptcy."

So there was no question about the validity of the claim or any jurisdiction to inquire into it and the questions of law and fact were for the state court to determine. What difference could it make how many common creditors filed claims, these have to be filed in order they may be aggregated and any surplus divided among them *pro rata.*

In what manner would a private map made and kept in the office of the carrier put anyone on notice that the carrier claimed possession of land by that map? The recording acts forbid such type of claims.

The purpose and intent of Rule 75 was to prevent adding to the burden of those taking appeals by padding the record as well as to save the time of the court and exhausting its storage space by sending up a lot of irrelevant matter that has nothing to do with the issues involved.

The rule announced by this court in *Barber* v. *Standard Asphalt*, 275 U. S. 372, was probably one basis for Rule 75

and its violation calls for the supervisory power of this court.

Wherefore, petitioner contends, certiorari should be granted for the following reasons:

1. To reconcile the various Federal and State construction of the bankruptcy act as to whether or not permission to sue a receiver is necessary in cases not specifically exempted.

2. To state the limits of the jurisdiction of a bankruptcy court and if it has jurisdiction to determine in a summary proceeding contested questions of law and fact, when it had no jurisdiction of the subject matter.

3. That if due process of law was afforded and if á Florida railway corporation with the right of eminent domain can obtain adverse possession of the title to private property.

4. If an applicant for leave to sue to enforce a vendor's lien can have her application denied and her application be construed in a summary proceeding to ask leave to sue in ejectment.

5. To construe Rule 75 of the District Courts and hold and declare the appellees were guilty of padding the record on the appeal to the Circuit Court of Appeals.

Respectfully submitted,

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